Evolving Disability Policies: from Welfare to Rights. An International Trend from a European Perspective

Evolving Disability Policies: From Social-Welfare to Human Rights
An International Trend from a European Perspective

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Abstract

The last decade has seen notable changes in a disability policy. Social-welfare policies which have sought to separate and segregate people with disabilities have been reconsidered, and attempts have been made to develop a more integrated approach. The new approach recognises the role which discrimination plays in disadvantaging people with disabilities, and seeks, through, inter alia, *legislation, to combat elements of disability discrimination and create equality of opportunity for people with disabilities. This article examines these developments and reflects on the attitudes and assumptions which lie behind disability policy today. The article focuses on recent developments in Europe, at both the domestic and European Union level, and places these developments in the context of evolving international human rights provisions, which have also begun to embrace a human rights approach disability. The area of employment is used to illustrate the changes in attitude, and the consequent changes in policy and legislation.*

Introduction

Until relatively recently, international human rights texts generally adopted one of two approaches towards disability: universal instruments, such as the International Covenant on Economic, Social and Cultural Rights, tended not to specifically mention people with disabilities, whilst 'specialist' instruments, such as the UN Declaration on the Rights of Mentally Retarded Persons (1971) and the Declaration on the Rights of Disabled Persons (1975), were targeted at people with disabilities. Such targeted instruments were naturally also directed towards other groups[1] – however, these other groups, such as women and racial minorities, tended also to receive attention in universal instruments,[2] and the targeted instruments which were directed at them tended to have a higher legal status than the declarations, resolutions and recommendations which addressed disability.

The failure to refer to disability in universal human rights texts, and the use of weaker non-binding instruments for those measures which targeted people with disabilities, arguably reflected the belief that people with disabilities were not a group that were particularly vulnerable to human rights abuses. Whilst policy-makers could not have doubted that people with disabilities were disadvantaged, this was explained by the existence of physical or mental impairments (a medical model of disability inspiring social-welfare policies), rather

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1 See, *e.g.*, Convention on the Elimination of All Forms of Racial Discrimination (1965) and the Convention on the Elimination of All Forms of Discrimination against Women (1979).

2 For example, in the general non-discrimination / equality articles contained in the instruments.

than being seen as a result of discrimination and inadequate respect for human rights (a rights based model of disability inspiring, amongst others, anti-discrimination laws). This international approach of developing separate instruments, and even at times a separate approach for people with disabilities, was also reflected in developments at the national level in Europe (and elsewhere), where policies and legislation provided for access to separate labour markets, education and housing for those people with disabilities who were unable to (easily) meet the standards set for non-disabled individuals. Since the inability of people with disabilities to integrate was explained by the existence of an impairment, the segregation of people with disabilities was seen as an appropriate, and perhaps even a kind response.

However, the last decade has seen notable changes in disability policy. Changed assumptions about the concept of disability, and particularly about the role which discrimination plays in disadvantaging people with disabilities, have been reflected in the adoption of new international and national instruments and policies. As a consequence, social-welfare policies which have sought to separate and segregate people with disabilities in 'special' schools, labour markets, residential accommodation and transport have, to some degree, and in some countries, been reconsidered, and attempts have been made to develop an integrated approach, opening up jobs, services and housing to all people irrespective of their ability or disability. A key element of this new approach has been the recognition that segregation and exclusion is not a necessary consequence of a physical or intellectual impairment, but the result of (conscious) (policy) choices based on false assumptions about the abilities of people with disabilities. The new approach recognises the role which discrimination – in the form of false assumptions about people with disabilities, and the failure to adapt inaccessible services and jobs – plays in disadvantaging people with disabilities, and seeks, through, *inter alia,* legislation, to combat elements of disability discrimination and create equality of opportunity for people with disabilities. The new approach embraces a human rights approach to disability.

One of the earliest set of domestic provisions that embraced this new approach, was the American Rehabilitation Act of 1973 and, in particular, the Americans with Disabilities Act of 1990. The latter Act, which was presented as an extension of civil rights legislation to cover people with disabilities, attracted a great deal of attention internationally, and has influenced both the international and European (domestic and regional) standard setting.

This article will examine some of the above mentioned developments and reflect on attitudes and assumptions which lie behind disability policy. The paper focuses on recent developments in Europe, at both the domestic and European Union level, and places these developments in the context of evolving international human rights provisions, which have also begun to embrace a human rights approach to disability. The area of employment will be used to illustrate the changes in attitude, and the consequent changes in policy and legislation. However, it should be noted that the developments examined in employment policy have often been reflected in other areas, such as access to services, residential accommodation, and education.

The first part of this article will give a brief overview of the most relevant international instruments. Both universal and specific instruments relating to employment will be considered, and recent changes in approach will be noted. The article will then consider how European countries have sought to promote the employment of people with disabilities over the last fifty years or so, and reflect on the assumptions underlying that policy. Recent changes in attitudes in some European countries will be noted and the article will consider how these changes have been reflected in new legislative approaches, not least of all through anti-discrimination legislation. The article will conclude with some reflections on the

developments which have led to this change in attitude and legislative approach in Europe, and note the influence of international human rights instruments.

I International Employment-Related Human Rights Instruments and Disability

A. Universal Instruments

A number of important universal human rights instruments specifically address employment. For example, the Universal Declaration of Human Rights, adopted by the UN General Assembly in December 1948, provides for the right to work, as well as a number of other related rights (Article 23). Furthermore, according to Article 2(1) of the Declaration:

> Everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other social status.

Clearly no specific mention is made of disability in this clause, nor indeed, elsewhere in the Declaration.

A further key international human rights instrument covering, *inter alia*, employment is the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR). The Covenant does not refer to people with disabilities and, most notably, disability is again not mentioned in the anti-discrimination provision contained in Article 2(2).

Various employment related rights are covered by the Covenant, including the 'right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts' (Article 6(1)).

It has always been clear that the norms contained in the UN Declaration and the ICESCR apply to all individuals, including people with disabilities. However, as Philip Alston has noted with regard to the ICESCR:

> The relevant norms were in fact interpreted and applied for many years in a way which tended to overlook or even entirely ignore [persons with disabilities].

Alston continues:

> There was often an unstated assumption that in the case of persons with disabilities a significant range of otherwise applicable human rights was for some reason mysteriously suspended or rendered inapplicable.[3]

Given that the Covenant was adopted in 1966, and finally came into force in 1976, it is not altogether surprising that the negotiating States failed to specifically address the situation of people with disabilities. As noted above, both national and international policy makers rarely attempted to integrate people with disabilities into mainstream policies at that time, and failed to recognise the role which discrimination played in excluding this group. However, at the national level, and particularly in North America, a disability civil rights movement was gradually emerging and bringing pressure to bear on national policy-makers to rethink their approach to disability policy in terms of a human rights framework. This pressure was also felt in the corridors of the United Nations, and on 12 March 1984 the UN

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3 Alston, P., 'Disability and the International Covenant on Economic, Social and Cultural Rights', in: Degener, T. and Koster-Dreese, Y. (eds.), *Human Rights and Disabled Persons*, Martinus Nijhoff Publishers, Dordrecht, 1995, p. 94 at p. 98.

Commission on Human Rights adopted a resolution[4] recommending that the Sub-Commission on Prevention of Discrimination and Protection of Minorities appoint a Special Rapporteur to report on the connection between serious violations of human rights and fundamental freedoms and disability. The report by Leandro Despouy,[5] which was published in 1993, revealed the extent to which the human rights of people with disabilities, including employment related rights, were being overlooked and abused, and resulted in a much greater awareness amongst the international community of its previous neglect of this group.

In relation to the ICESCR, the most significant result of this 'new' awareness of the rights of people with disabilities was the General Comment[6] on People with Disabilities adopted in 1994 by the Committee on Economic, Social and Cultural Rights. The General Comment emphasises, *inter alia*, the relevance of the employment provisions of the Covenant, noting for example that the 'right of everyone to the opportunity to gain his living by work which he freely chooses or accepts (Article 6(1)) is not realised where the only real opportunity open to disabled workers is to work in so-called "sheltered" facilities under sub-standard conditions' (para. 21). Significantly the General Comment also notes the role which discrimination and physical barriers, such as inaccessible transportation and work places, play in excluding people with disabilities, and calls on governments to take action to remove such barriers and 'reasonably accommodate the needs of disabled workers' (para. 22).

The General Comment also refers to the absence of a specific reference to disability in the Covenant, which is attributed to a 'lack of awareness of the importance of addressing this explicitly' at the time of drafting (para. 6). The Comment notes that it is 'now very widely accepted that the human rights of persons with disabilities must be protected and promoted through general, as well as specially designed, laws, policies and programmes'. This reflects the newer approach to disability policy at the international level.

Numerous general instruments concerning employment policy and employment discrimination have also been adopted under the auspices of the International Labour Organisation. These include Convention 111 on Discrimination (Employment and Occupation) (1958), Convention 122 on Employment Policy (1964) and two Recommendations on Employment Policy (Recommendation 122 (1964) and Recommendation 169 (1984)). Like the ICESCR, none of these instruments specifically refer to people with disabilities, and disability is excluded from the (at times) closed list of grounds covered in specific anti-discrimination clauses.[7] At the same time as adopting these general instruments which failed to refer to persons with disabilities, the ILO adopted a number of Conventions and Recommendations which specifically targeted this group (see below). This again reflected a strictly segregated approach to policy making.

Meanwhile, at the European level, the Council of Europe had adopted two significant human rights instruments in the form of the European Convention for the Protection of Human Rights (ECHR), which does not refer to people with disabilities (but see commentary on Protocol No. 12 to the ECHR below), and the European Social Charter. Articles 1 to 10 of the European Social Charter contain a number of employment-related rights, including the right to work (Article 1), the right to just conditions of work (Article 2), and the right to a fair renumeration (Article 4). No reference is made in these articles to persons with disabilities, or indeed in the general anti-discrimination provision contained in the preamble to the

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4 1984/31.

5 Despouy, L., *Human Rights and Disabled Persons*, United Nations, New York, 1993.

6 General Comment No. 5, UN Doc E/C. 12/1994/13 (1994).

7 See, for example, Article 1(1) of Convention 111 Discrimination (Employment and Occupation).

Charter. However, Article 15 of the Charter is devoted to the 'right of physically or mentally disabled persons to vocational training, rehabilitation and social resettlement'. Under this article, the contracting parties are to provide for adequate training facilities and measures to promote the employment of people with disabilities, including 'specialised institutions', 'specialised placing services' and 'facilities for sheltered employment'. The failure to integrate specific provisions dealing with the employment of people with disabilities into the general employment provisions, and, in particular, the emphasis placed on specialised services rather than mainstream services again reflects a segregated approach to disability policy.

In 1991, at a ministerial conference held in Turin, the decision was taken to update and adapt the contents of the Social Charter in order to 'take account in particular of the fundamental social changes which [had] occurred since the text was adopted'.[8] The revised Social Charter, which has thus far only been ratified by a limited number of States,[9] does not refer specifically to people with disabilities in the main employment provisions but does contain a significantly amended Article 15. The aim of this article is now to promote the 'right of persons with disabilities to independence, social integration and participation in the life of the Community'. The emphasis in the article is on promoting the access of people with disabilities to general guidance, education and vocational training schemes and employment in the 'ordinary working environment'. Specialised placement schemes and sheltered employment are only to be used where absolutely necessary. The article also promotes the adoption of measures 'to overcome barriers to communication and mobility and enabling access to transport, housing, cultural activities and leisure'. The revised Social Charter therefore, with its emphasis on integrated measures and the removal of barriers to participation, moves away from the segregated approach to disability policy-making. However, one should note that the provisions concerning the employment of people with disabilities have not been integrated into the main employment articles.

Furthermore, the Council of Europe has recently adopted Protocol No. 12 to the ECHR which establishes for the first time an independent right to be free from discrimination.[10] The Protocol provides:

> The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.[11]

O'Hare has argued that the Protocol will ensure that the non-discrimination guarantee will no longer simply apply in respect of civil and political rights, as already provided for in Article 14 of the ECHR, but also in respect of economic and social rights in international and, in monist States, national law. She argues that in this way the rights contained in the Council of Europe's Social Charter may become relevant in a claim under the Protocol where they are applied in a discriminatory manner.[12] The Protocol follows Article 14 of the ECHR in relation to the listed grounds of discrimination, and thus excludes disability. One reason given for this restriction was that the prohibited grounds of discrimination in Article 14 are

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8 Preamble to the revised European Social Charter.

9 Bulgaria, France, Italy, Romania, Slovenia and Sweden as of 2 April 2001.

10 Protocol No. 12 to the European Convention on Human Rights and Explanatory Report, available at http://www.dhrihr.coe.fr/.

11 Article 1.

12 O'Hare, U., 'Enhancing European Equality Rights: A New Regional Framework', in: *Maastricht Journal of European and Comparitive Law*, Vol. 8, 2001, forthcoming.

not closed, so that an extension was not necessary. O'Hare has criticised this approach as 'smack[ing] of a hierarchy of discrimination between the listed and unlisted grounds'.

B. Targeted Instruments

As noted above, the general neglect, or at least separate treatment, of people with disabilities in universal human rights texts was paralleled by a tendency to adopt specialised and targeted instruments dealing only with disability. One early such document was Recommendation 99 of the ILO on Vocational Rehabilitation (Disabled) (1955). This Recommendation is very much based on a medical conception of disability rather than a human rights based model. The preamble to the Recommendation notes that 'there are many and varied problems concerning those who suffer disability' and 'rehabilitation of such persons is essential in order that they be restored to the fullest possible physical, mental, social, vocational and economic usefulness of which they are capable'. The emphasis is therefore on adapting the individual with a disability, rather than on seeking to eliminate disability discrimination and the barriers which hamper the participation of people with disabilities. Having said that, integrated employment and training are the preferred options under the Recommendation; however the role of specialised guidance services (Article 3), training provisions (Article 8), placement services (Article 10) and sheltered employment (Article 32 to 35) are also emphasised.

In 1983, influenced by the UN International Year of Disabled Persons (1981) and the recognition that rehabilitation policy had advanced, the ILO adopted Convention 159 on Vocational Rehabilitation and Employment (Disabled Persons). The aim of this Convention is to encourage States to ensure that 'appropriate rehabilitation measures are made available to all categories of disabled persons, and (...) promot[e] employment opportunities for disabled persons in the open labour market' (Article 3). The Convention emphasised that policy should be based on the 'principle of equal opportunity' (Article 4). This emphasis on equality is not found in the earlier ILO recommendation.

Two other international texts which focus exclusively on persons with disabilities are the UN Declaration on the Rights of Mentally Retarded Persons (1971) and the UN Declaration on the Rights of Disabled Persons (1975). The latter Declaration, whilst containing a definition of disability based on the medical model which identifies any disadvantages as being caused by the 'deficiency (...) in (...) physical or mental capabilities' (Article 1), also emphasises the need to respect the human rights of people with disabilities (Articles 3 and 4) and to protect 'disabled persons (...) against all exploitation, all regulations and all treatment of a discriminatory, abusive or degrading nature' (Article 10).

Undoubtedly the most far-reaching and 'modern' international instrument targeted at people with disabilities are the United Nations Standard Rules on the Equalisation of Opportunities for Persons with Disabilities adopted by the General Assembly of the United Nations in 1993. The Rules were perceived as a substitute for a binding international treaty,[13] and should set the standard for national (and international) disability policy and laws.[14] The

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13 A proposal that the General Assembly adopt a Convention on the elimination of all forms of Discrimination against Disabled Persons was rejected. UN DOC. A/C.3./42.SR.13 (1987). See Degener, T., 'Disabled Persons and Human Rights: The Legal Framework', in: Degener and Koster-Dreese (eds.), *op.cit.* (note 3), p. 12.

14 Note however Preamble 14 to the Introduction of the Standard Rules which states that 'although the Rules are not compulsory, they can become international customary rules when they are applied by a great number of states with the intention of respecting a rule in international law'.

Standard Rules are very much based on a rights-based approach to disability and address the role which discrimination, in its many forms, plays in disadvantaging people with disabilities. The Rules are critical of the way in which the terms 'disability' and 'handicap' have been used in the past, stating that the 'terminology reflects a medical and diagnostic approach, which ignored the imperfections and deficiencies of the surrounding society'.[15] Amongst the areas targeted in the Standard Rules for 'Equal Participation' is employment (Rule 7). This Rule provides that:

> Laws and regulation in the employment field must not discriminate against persons with disabilities and must not raise obstacles to their employment.

In addition, States are to support actively the integration of persons with disabilities into open employment and should ensure that action programmes include measures to design and adapt workplaces and premises in such a way that they become accessible to persons with different disabilities. The Standard Rules emphasise that the aim should always be for persons with disabilities to obtain employment in the open labour market. Employment in small units of sheltered or supported employment should only be used where the needs of individuals cannot be met in open employment.

This relatively modern instrument of disability policy therefore places a significant emphasis on the equal rights of people with disabilities and fully embraces the rights-based concept of disability. At the national level, in some cases, policy is also coming to adopt such an approach. The following sections of this article consider how earlier national disability employment policies in Europe, like the earlier international instruments, were based on a separate and segregated approach and a medical notion of disability, and notes that some recent policy changes in Europe have followed the lead of the Standard Rules and sought to address the problems of discrimination and the inaccessible environment.

The Standard Rules and, indeed, national disability anti-discrimination legislation, reveal how a 'separate' disability specific instrument can be based on the rights-based approach to disability, and seek to achieve the integration of people with disabilities. Such an instrument can serve to complement universal measures which specifically take account of the position of people with disabilities, but which are unable to achieve the precision or focus of a specific instrument, and therefore cannot fully take account of the position and needs of people with disabilities. For this reason it is not surprising that the disability movement is campaigning for a stronger disability specific UN instrument, in the form of a Convention, and the European disability movement is lobbying for a disability specific non-discrimination directive, drawing inspiration from the long-standing (gender based) Equal Treatment Directive and the recently adopted Race Directive. Such specific instruments, based on the human rights approach to disability, could serve to promote the elimination of disability discrimination and the integration of people with disabilities, whilst not suffering from the drawbacks of the earlier disability specific instruments which were based on the medical model of disability.

II Which Europe?

The sub-title of this paper refers to a 'European perspective' on the rights of people with disabilities in Europe. Europe is a large region, consisting of many different countries, and

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15 Introduction, Preamble 19.

it seems appropriate to reflect on what is meant by 'European' in this context. The focus of this article is on those European countries which make up the European Union,[16] and on the European Union itself, as a supra-national organisation with law-making powers. However, even within this relatively cohesive organisation there remain great differences in legal and philosophical approaches to disability policy.

Furthermore, it should be borne in mind that, whilst the idea that people with disabilities frequently experience discrimination in many areas of life is gaining widespread acceptance within Europe, as evidenced by recent initiatives of the two major regional organisations, this recognition is, as yet, only working through to effect policy and legislation in some European countries.

III The Old School of Thought – Some Attempts at Inclusion, but also Separation and Segregation

As noted above, employment policy will be used to illustrate the changes in attitude, and consequent changes in disability policy which have occurred in some European countries. One can identify three general strands to the disability employment policies of most European countries: the provision of support for workers with a disability and / or their employers where workers with a disability obtain employment in the competitive labour market; the reservation of a specific quota or percentage of jobs for workers with a disability; and the creation of a separate sheltered labour market exclusively for workers with a disability.

The first strand, whereby workers with a disability are given support and assistance so that they can obtain and maintain employment in a competitive environment, is usually targeted at workers with less severe disabilities and can be regarded as a long standing attempt to secure the integration of such workers in the conventional labour market.

The second strand involves legislative intervention to promote the employment of people with disabilities through quotas. With the exception of Scandinavia, the quota system has become the standard response of practically all European countries to the employment problems faced by people with disabilities seeking work in the conventional labour market. However, even though those people with disabilities who obtain work through a quota system work side by side with workers who obtained employment in the conventional (usually competitive) manner, they remain part of a separate labour market – where a set percentage of jobs is reserved for those individuals classified as disabled, and where competition for jobs is theoretically restricted to this limited group.

The third strand involves an alternative labour market which is both separate, in that it is confined to workers with a (severe) disability, and segregated, in that it is completely removed from the open labour market, with workers in the two labour markets usually having little contact with each other. This is the labour market based on 'sheltered employment', which is designed to provide work for those people with a disability who are regarded as 'unemployable' in the open labour market.

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16 The following 15 countries are currently members of the European Union: France, Germany, Italy, Belgium, Netherlands, Luxembourg (founder members - 1957), the United Kingdom, Ireland, Denmark (1973), Spain, Portugal (1983), Greece (1986), Austria, Sweden and Finland (1996).

A. Support to Obtain and Maintain Employment in the Conventional (Competitive) Labour Market

Many European countries provide support to people with disabilities and/or their employers to enable the individual to secure and maintain employment. This support often takes the form of financial or personal support, although legislation, imposing binding obligations on employers, often also has a part to play. The most common kinds of support and intervention which are provided are the following:[17]

- Special assistance and advice targeted at people with a disability to help them obtain employment. This assistance may be provided from within the ordinary employment placement office, or from a separate specialist office;[18]
- Rapid intervention to help prevent long-term unemployment of people with disabilities, *e.g.* offering of training or educational courses after only a relatively short period of unemployment;[19]
- Loan or purchase of specialised equipment, *e.g.* adapted computer, furniture, protective equipment, to enable the individual with a disability to carry out a specific job;
- Provision of a job coach (on a temporary basis) to assist the individual with a disability to obtain the necessary skills;
- Grants to enable an employer to make physical adaptions to the workplace.;[20]
- (Temporary) subsidies or tax credits to employers who take on a worker with a disability.
- Additional legislative protection from dismissal for workers with a disability;[21]
- In addition, in some countries employers are under certain general legal obligations which may enhance the employment possibilities of people with disabilities.[22]

Such provisions are in line with international instruments such as Recommendation 99 of the ILO on Vocational Rehabilitation (Disabled) of 1955, which states that integrated employment and training is the preferred approach, but which also emphasises the role of specialist services and provisions.

It is difficult to assess the effectiveness of these strategies. Some schemes providing financial assistance to either the worker or, in particular, the employer, have not been drawn on as much as was initially anticipated, possibly because employers are deterred by complicated application procedures. Legislative obligations on employers, such as restrictions in their ability to dismiss workers with a disability, may be a double-edged sword. Such provisions may well provide additional support for those workers with a disability already in employment; however, the existence of such rules may also discourage employers

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17 For more information on the kinds of support and intervention available in European Union (and some non-European countries) see Thornton, P. and Lunt, N., *Employment Policies for Disabled People in Eighteen Countries: A Review*, Social Policy Research Unit, The University of York, York, 1997.

18 Specialist Disability Employment Advisers were responsible for providing such assistance to people with disabilities in the United Kingdom.

19 As in the case with the 'New Deal' in the United Kingdom.

20 Such as the British Access to Work scheme and the German grant scheme provided for under section 11(3) of the *Schwerbehindertergesetz (SchwbG)* (Severely Handicapped Persons Act).

21 See the German provision found in the *Vierter Abschnitt - Kündigungsschutz* section 15-22.

22 Such as the *Fürsorgepflicht* [Duty to provide for the worker] under German law and *Goed Werkgeverschap* [Good employer practice] under Dutch law. For further information see Hendriks, A., *Gelijke Toegang tot de Arbeid voor Gehandicapten*, [Equal Acces to Employant for the Disabled] Kluwer, Deventer, 2000 and De Wit, M.A.C., *Het goed werkgeverschap als intermediar van normen in het arbeidsrecht* [The good employer practice as intermediary of norms in labour law] ,Kluwer, Deventer, 1999.

from taking on such workers in the first place. In any case, such schemes do little to address the problem of employers who simply do not wish to employ workers with a disability, either because they believe such workers are less effective or because they are concerned about the reliability of such workers. Instead, the schemes simply seek to make it easier for those employers who are already disposed to employing individuals with a disability to do so.

Beliefs Underlying Support for Employment in the Conventional Labour Market

In recent years, many European countries have sought to develop new tools to promote the employment of people with disabilities in the conventional labour market. This reflects the belief that employment in the open labour market is the preferred option for people with disabilities. This is also the position of the disability-specific international instruments referred to above. It is also evidence that policy-makers believe that (some) people with disabilities are able to compete for and hold down jobs in the open labour market, albeit at times with additional public support. Finally, the instruments demonstrate that policy-makers believe that the employment of people with disabilities can impose extra burdens on employers, in the form of the need to provide extra training, specialised equipment, an adapted workplace or some other cost, and that it is not appropriate for the employer to have to bear all those costs. Instead, the State should intervene and cover some of these extra costs. State support therefore usually attempts to make the employment of qualified people with disabilities no less attractive than the employment of qualified people without a disability, by removing any extra costs associated with the former. However, as noted in the preceding paragraph, administrative problems and the emphasis on the goodwill of employers (which does not always exist), has not made such an approach particularly successful.

B. The Emergence and Development of the Quota System in Europe[23]

For the greater part of the previous century quotas, whereby employers are encouraged or obliged to employ a set percentage of persons with a disability, were the main plank of disability employment policy in Western Europe.[24] Notwithstanding recent interest in disability (employment) anti-discrimination legislation in Europe, quotas continue to be seen as the key tool for securing the employment of people with disabilities in many countries.

The early quota systems had their origins in the post First World War period, and only covered disabled veterans.[25] However, some countries shied away from imposing an employment obligation on employers, and instead sought to encourage employers to voluntarily take on disabled veterans. The high unemployment levels amongst disabled veterans during the inter-war years, and the lack of success of the voluntary approach, led most European countries to turn to the obligation based quota system in the post Second World War period. These second generation quotas were extended to cover the disabled civilian population. A consequence of this extension was that the concept of duty, which had existed when the systems were exclusively targeted at veterans, was lost, and the new quotas

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23 For more detailed comment on European quota systems see: Waddington, L., 'Legislating to Employ People with Disabilities: the European and the American Way', in: *Maastricht Journal of European and Comparative Law*, Vol. 1, No. 1, 1994, pp. 367-395 and Waddington, L., 'Reassessing the Employment of People with Disabilities in Europe: from Quotas to Anti-Discrimination', in: *Comparative Labor Law Journal*, Vol. 18, No. 1, 1996, pp. 62-101.

24 With the exception of the Scandinavian countries.

25 Kulkarni, M. R., *Quota Systems and the Employment of the Handicapped. Experiences in three countries*, University Center for Institutional Rehabilitation, Michigan State University, Michigan, undated, p. 10.

became part of overall social welfare policy. Today, ten of the fifteen Member States of the European Union have some form of quota system,[26] and quotas can also be found in many European countries which are at present not members of the Union.[27] All quota systems require employers to employ a set percentage of disabled workers, but within this general framework there is a great deal of scope for variety, and for this reason one cannot speak of a uniform European quota system. Instead, European quota systems can be divided into the following three basic models:

i) Legislative Recommendation

Under this approach, employers are not obliged to employ a set percentage of workers with disabilities, but it is recommended that they do so.[28] Such quotas are voluntary and the legislation does not provide for any sanctions in the event of employers failing to meet the set target.

Not surprisingly, experience suggests that a voluntary quota, which imposes no legal obligation upon employers and provides for no sanctions, has little impact on the numbers of people with disabilities in open employment.[29]

ii) Legislative Obligation But No Effective Sanction

A second approach relies on legislation to oblige employers to employ a quota of people with disabilities; however, this obligation is not backed up with any effective sanction or the sanction is not actually enforced. This model is typified by the quota system adopted in Britain after the Second World War under the Disabled Persons (Employment) Act (DPEA) of 1944. In Britain, this form of quota was not successful in promoting the employment of disabled people, and each year progressively fewer employers met their quota obligation. There were a number of reasons for the failure of the British quota system, but the most important one was the unwillingness or inability of successive governments to enforce the quota by strictly policing the granting of exemption permits and prosecuting errant employers.

Evidence from Britain clearly shows that it is insufficient to simply legislate to impose an obligation on employers to employ disabled people. Such quota systems do little more than rely on the goodwill of employers, and do not greatly increase the chances of the covered individuals in the open labour market. The quota was finally abolished in Britain on 2 December 1996, when the employment provisions of the new disability anti-discrimination law, the Disability Discrimination Act 1995, came into force.

iii) Legislative Obligation Backed Up By Sanction (Levy-Grant System)

Under this model, employers are either obliged to meet their quota target or pay a fine or levy

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26 Portugal and the United Kingdom and the three Scandinavian Member States do not have a quota system.

27 Such as Poland, see, Law on Employment and Vocational Rehabilitation of Disabled People (consolidated text) (Dz. U. No. 46, item 201) published in *Disability: Problems and Solutions*, Bulletin: Special edition 1994, Center for Europe Warsaw University, Information and documentation Unit of the Council of Europe.

28 For an example see the Dutch Handicapped Workers Employment Act of 1986 (WAGW). This Act has now been replaced by the Law on the (Re)Integration of the Work Disabled (REA). One could argue that the REA provides for an indirect quota, since employers whose workforce consists of at least 5 per cent of employees with a disability are exempted from paying certain social premiums.

29 For further information see Waddington's commentary on the Dutch Handicapped Workers Act in 'Legislating to Employ People with Disabilities: The European and American Way', in: *Maastricht Journal of European and Comparative Law*, Vol. 1, No. 4, 1994, pp. 367-395.

which usually goes into a fund to support the employment of people with disabilities. Germany provides one of the earliest examples of such a system, and its quota has since served as a model for other countries.

Such quotas are based on the principle that all employers above a certain size should contribute to the economic integration of workers with a severe disability. Ideally, this integration should occur through the actual provision of employment for such workers, but where this is not the case, a contribution should be made via the levy procedure. The German quota system has undoubtedly made a greater contribution to promoting the employment of disabled people than the two systems described above. However, in recent years the German quota has become progressively less effective and has proved itself incapable of maintaining the targeted level of employment for severely disabled people during a period of economic recession. The economic difficulties, combined with the relatively low levy, seem to make payment a more attractive option than the perceived unknown risks of hiring a worker with a severe disability.

Beliefs Underlying the Quota System

European quota systems clearly aim to promote the employment of people with disabilities, and are based on the belief that, without some form of legislative intervention, disabled people would not make up the relevant (quota) percentage of the employed workforce. In addition, European quotas are based on two related assumptions: 1) that employers will not hire large numbers of disabled people unless they are required to do so, and 2) that a large number of people with disabilities are unable to compete for jobs with their non-disabled counterparts on an equal basis, and win them on their merits. In short, the assumption is that most workers with a disability are less valuable economically and less productive, and that, if such workers are to be integrated in the open labour market, employers need to be obliged to hire them. Numerous employers have taken their cue from the legislation, and accept these assumptions. This is reflected in the fact that many employers resist the idea of, and obligations under, quota systems, and frequently 'buy' themselves out of their obligation where this is an option, preferring to employ a largely non-disabled workforce.

The history of the European quota systems demonstrates that an employment system which is based on the idea that the protected group of workers is inferior, cannot achieve permanent and significant successes, since employers will attempt to evade their obligations to employ such workers. In addition, those workers who obtain employment through the quota scheme, and perhaps even those workers with a disability who obtain employment on their merits in an open competition, risk being stigmatised by the existence of the scheme.

Nevertheless, it should be noted that quota schemes remain in force in most European countries and are an important element of government policies which seek to promote the employment of people with disabilities. In addition, such schemes are frequently popular with people with disabilities, who often identify the problem with such schemes as weak enforcement and lack of sanctions for employers who do not meet their obligations. Organisations representing people with disabilities in the United Kingdom, for example, whilst generally welcoming the adoption of disability anti-discrimination legislation, opposed the repeal of the quota law. Instead, they argued that both the new anti-discrimination law and the quota law should be strictly enforced.

C. The Emergence and Development of the Sheltered Workshops in Europe

Sheltered workshops are the third important element of employment programmes for people with disabilities, at least in northern European countries. The 1989 European Labour Force Survey[30] found that approximately 350,000 people worked in sheltered employment (in the then 12 Member States; subsequently Austria, Finland and Sweden have joined the European Community), with three Member States (Germany, France and the Netherlands) accounting for about 80 per cent of these workers.

Sheltered workshops are also addressed in ILO instruments and in instruments of a number of other international and regional organisations. For example, ILO Recommendation No. 99 of 1955, on the vocational rehabilitation of disabled people, refers to sheltered employment as one of the measures to be used to allow people with disabilities to obtain or retain suitable employment. According to the Recommendation, sheltered employment should be provided for 'disabled persons who cannot be made fit for ordinary competitive employment'.[31] The object of employment in sheltered workshops is to 'provide, under effective medical and vocational supervision, not only useful and remunerative work but opportunities for vocational adjustment and advancement with, whenever possible, transfer to open employment'.[32] Similar definitions of both the target group and objectives of such employment can be found in current national legislation, as well as in texts of the Council of Europe[33] and the European Community.[34]

Whilst the stated object of all sheltered workshop programmes in Europe is to provide both useful remunerative work and training *and* prepare the worker for employment in the open labour market, there has been a notable lack of success with regard to the latter objective. In most countries operating such programmes, less than 5 per cent of workers per year are able to make the move from the sheltered to the open labour market. Indeed, at a time when public spending is frequently decreasing, there may actually be disincentives for individual sheltered workshops to promote the transfer of their more able workers. Sheltered programmes are often expected to cover an increasing amount of their own costs, through the sale of goods and services which they produce. Given that scenario, the workshops are understandably reluctant to lose their most productive workers and may seek to exclude potential workers who are expected to have a low productivity.

In recent years, and particularly since the late 1980s, some countries have been attempting to move away from the classical form of sheltered employment, with workers with a disability working in a factory-like setting and having little contact with the outside world, and to develop more open forms of employment, where the worker has the opportunity to inter-act with people from outside the enclosed sheltered environment. These new initiatives, sometimes referred to as semi-sheltered employment, nevertheless provide a considerable degree of protection for the worker and do not amount to employment in the open labour market.

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30 Labour Force Survey. Results 1989, Brussels-Luxembourg, Eurostat 1991.

31 Article 32(1).

32 Article 33.

33 See, *e.g.*, 'A coherent policy for the rehabilitation of disabled people', Resolution AP(84)3 adopted by the Committee of Ministers on 17 September 1984, Strasbourg, Council of Europe, 1984, p. 21.

34 See, *e.g.*, Council Recommendation on the employment of disabled people in the Community, 86/379/EEC.

Beliefs Underlying Sheltered Employment Schemes

Under sheltered employment schemes it is recognised that individuals with more severe disabilities are capable of work of economic value – for the goods and services produced by sheltered workshops are sold in the open market – but that these workers are not yet able to hold down jobs in the open labour market. This reduced ability was seen, until recently, as justifying the separation and segregation of such workers from the rest of the workforce. Recently, efforts have been made to reduce the barriers between open and sheltered employment; however, this is proving to be time consuming and expensive, and the vast majority of people employed under sheltered employment schemes still work in a segregated and separate environment.

Approaches to and Beliefs Underlying Areas Other than Employment

The developments and attitudes examined above have also been reflected in other areas of policy, such as education, housing and access to transport. In all of these areas, people with disabilities have been able to participate in mainstream services, if they could meet the requirements of those services, *e.g.* ability to learn in a large group whilst not disrupting lessons; ability to enter, move around and utilise unadapted housing, whilst not excessively disturbing neighbours; ability to board modes of transport and understand how the systems work. In addition, public assistance was sometimes provided to enable individuals to function in the mainstream environment, *e.g.* additional classroom help or extra lessons.

For that group who could not make use of ordinary facilities, which were largely designed without people with disabilities in mind, alternative 'separate and segregated' services were provided. With regard to education, this took the form of 'special' schools attended only by children with disabilities. Educational expectations and standards at such schools were usually lower than at conventional schools, even for those children who did not have a learning disability. With regard to housing, this took the form of large institutions housing hundreds of people with disabilities, with individuals often sleeping in huge dormitory-like rooms. Over the last decades, these institutions have tended to close down, or at least been broken up into smaller units. With regard to transport, separation and segregation took the form of door-to-door transport for people with disabilities. This transport often had to be ordered hours or days in advance, was restricted to a certain number of journeys per week, and was at time unreliable. In many respects, the situation remains the same today.

IV Recent Developments: A Reassessment of the Notion of Disability and Moves to Combat Discrimination

An important reassessment of disability policy has been occurring in a number of European countries, as well as in the wider international community, over the past decade. The reassessment has involved both the development of a new conceptualisation of disability, and consequent changes in legislation and policy. The national policies described in the previous section were developed at a time when the 'medical model' of disability was dominant and, more importantly, accepted by policy-makers. Since this model locates the problem primarily in the individual, and in his or her physical or intellectual condition, it is the individual who must adapt if s/he wishes to participate in mainstream society. If the individual cannot meet the expectations and norms of mainstream society, then s/he is offered – and confined to – an alternative, separate and often segregated, labour market, education system or residential accommodation.

However, in recent years this approach has been questioned – firstly by groups representing the interests of people with a disability and, later, by some policy-makers. The medical model of disability has increasingly been rejected in favour of a model which embraces a human rights approach. This can be seen as a fundamental reconceptualisation of disability and, since the human rights model focuses on deficiencies in society and the environment instead of those in the individual, it has different policy implications from the medical model. Under the human rights model, disability is seen as representing a dynamic relationship between individuals with a disability and their surroundings, so that the emphasis is switched from the individual to the broader social, cultural, economic and political environment. This has the advantage of not focusing on the alleged inabilities or limitations of an individual, and has the potential to allow for the consideration of the capabilities of those concerned. The model also allows for the recognition of discrimination, in its many forms, as one of the most important barriers to the economic and social integration of people with disabilities, and justifies public intervention designed to combat this discrimination and guarantee rights – related to participation in society – for people with disabilities.

At the pan-European level, probably the most important manifestation of this change in attitude has been an amendment to the Treaty of the European Community allowing for legislative action to combat disability discrimination and the subsequent adoption of a Framework Employment Directive addressing, *inter alia*, disability discrimination. However, these developments reflect the changes in attitude and policy that were already occurring in a number of Member States of the European Community, as well as in the international community, as evidenced by the adoption of the United Nations Standard Rules mentioned above. The acceptance of the human rights model of disability, and the recognition of the need to take legislative action to combat disability discrimination and protect social and civil rights, has, however, not resulted in one common response which can be found in all European countries, but in a number of different responses using a variety of legal tools and approaches. France was one of the first European countries to extend the protection of the law to victims of disability discrimination by making such discrimination a criminal offence. More recently, the constitutions in Germany, Finland and Austria have been amended, and in all three cases the relevant equal protection clause now explicitly names disabled people as a protected group. Meanwhile, legislators in Britain, Ireland and Sweden have recently adopted laws addressing disability discrimination, and a proposal for such legislation will shortly be presented to the Dutch Parliament.[35] These responses reveal at least three different approaches to combating disability (employment) discrimination in Europe through legislation. These developments are examined in further detail below, and attention is paid in particular to the impact of the relevant legislative provision and concept of disability discrimination as defined, if at all, in the legislation.

A. Constitutional Law: The Federal Republic of Germany[36]

Prior to 1994 the German Basic Law (*Grundgesetz*) or Constitution contained no provision specifically favouring people with disabilities, and no reference to disability was found in

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35 The draft bill on Equal Treatment on the Grounds of Handicap or Chronic Disease.

36 Similar provisions exist in the constitutions of Finland and Austria. The relevant provisions are Part II, Chapter 2, Basic Rights and liberties, Section 6 Equality, of the Finnish constitution and Article 7(1) of the Austrian constitution.

Article 3 which covers equality. On 27 October 1994, the Basic Law was amended, and a provision addressing discrimination on the grounds of handicap was inserted into Article 3.[37] The Constitution has subsequently been amended a number of times, and the complete text of Article 3 now reads:

> 1) All humans are equal before the law;
> 2) Men and women are equal. The State supports the effective realization of equality of women and men and works towards abolishing present disadvantages;
> 3) No one may be disadvantaged or favoured because of his sex, his parentage, his race, his language, his homeland and origin, his faith, or his religious or political opinions. No one may be disadvantaged because of his handicap.[38]

At the public level, the new provision binds the legislature, the executive and the administration and applies to the Federal Government, the *Länder* and *Gemeinden*, as well as to all public servants acting in an official capacity. There is an obligation to ensure that new statutes, regulations and administrative norms do not discriminate against people with a disability, and to amend existing provisions which have that effect, and for the courts to interpret instruments, and hand down rulings, which do not discriminate solely on the grounds of disability. The provision has already had consequences at the level of the *Länder*, where legislators have inserted clauses into new public transport acts to ensure that the needs of people with mobility disabilities are taken into account in the purchasing of vehicles and constructing of facilities.[39] However, this is one of the rare examples of a constitutional change provoking legislative change, and up until now the new non-discrimination clause has had little practical effect.

Nevertheless, given the extent to which constitutional norms penetrate the German legal system through the concept of *Drittwerkung*, this amendment clearly contains the potential to lead to improvements in the situation of people with a disability. However, there are a number of major problems with the German approach and the constitutional amendment, on its own, is insufficient to make major inroads into the problem of disability discrimination. The new provision is a simple statement which fails to define the key concepts of 'disadvantaged' and 'handicap'. If the principle of disability non-discrimination is truly to become part of German legal culture, the constitution arguably needs to be backed up by a thorough anti-discrimination law which clearly defines both the group of beneficiaries and the nature of the prohibited act. This is currently being lobbied for by some people with a disability in Germany, who, through a 'Forum of Disabled Lawyers and Judges', have produced a draft proposal which includes definitions of the concepts of 'handicap' and 'discrimination'.

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37 Original: 'Niemand darf wegen seiner Behinderung benachteiligt werden'. Gesetz zur Änderung des Grundgesetzes, *Bundesgesetzblatt*, Jahrgang 1994, Teil I, 3146.

38 Source: Würzburg University International Constitutional Law home page at http://www.uni-wuerzburg.de/law/

39 *Invisible Citizens, Disabled Person's Status in the European Treaties*, Report for the European Day of Disabled Persons, Brussels, European Parliament, 1995, doc.nr. D/1995/7560/2, p. 66.

B. Civil Law: The United Kingdom[40]

After a number of unsuccessful attempts to secure the adoption of a disability anti-discrimination law, such an instrument was finally adopted in 1995. The Disability Discrimination Act 1995[41] addresses disability discrimination in the areas of employment, education, transport, as well as a number of other fields such as the provision of goods, facilities and services, and premises. With regard to employment, employers with 20 or more employees are prohibited from discriminating against people with disabilities in respect of selection, recruitment, terms under which employment is offered, terms and conditions of employment, opportunities for promotion, transfer and training, and dismissal.[42]

The concepts which are of vital importance for an understanding of the legislation, and which heavily influence its effectiveness, are disability and discrimination. The Act defines a person with a disability as someone who 'has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities'.[43] With regard to employment, an individual who 'has had a disability' is also covered.[44]

This definition is complicated, and requires further elaboration in order to be fully comprehended. To a limited extent this is done in the first Schedule to the Act which provides some insight into the meaning of the key phrases contained in the definition, and also allows for additional explanatory regulations to be adopted. After a period of consultation, such draft regulations were presented to the British Parliament in June 1996 and adopted in July 1996.[45]

The first phrase in the definition of disability which requires further comment, is the concept of 'impairment' itself. In fact, this concept is not defined in the Schedule to the Act, and the Code of Practice, as the explanatory regulations are called, throws little light on the matter. The concept of 'normal day-to-day' activities also plays a crucial role in the definition. The Schedule provides an exhaustive list of activities which fall into this category, and these include mobility, manual dexterity, and memory, ability to concentrate, learn or understand.[46] For the 'impairment' to amount to a 'disability' it must have a 'substantial and long-term effect' on the ability to carry out such activities. 'Substantial' is defined in the Code of Practice as 'something which is more than a minor or trivial effect',[47] whilst the

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40 For reasons of space it was not possible to include an analysis of the relevant legislation in Ireland and Sweden. The relevant national provisions are Sweden's Law prohibiting Discrimination in Working Life on Grounds of Disability 1999 and the Irish Employment Equity Act 1998 and Equal Status Bill (revised) 1998. For further information on the Irish Employment Equity Act 1998 see the note by Lucy-Ann Buckley in *Industrial Law Journal*, Vol. 29, No. 5, September 2000, pp. 273-279.

41 1995 Chapter 50.

42 Part II, Sec. 4(1) and (2).

43 Art. 1(1).

44 This also applies to Part III of the Act, entitled Discrimination in Other Areas, which covers goods, facilities, and services, premises and enforcement.

45 Code of Practice for the Elimination of Discrimination in the Field of Employment Against Disabled Persons or Persons who have had a Disability.

46 Schedule 1, Art. 4(1). Other listed activities are physical coordination; continence; ability to lift, carry or otherwise move everyday objects; speech, hearing or eyesight; and perception of the risk of physical danger. The list does not, interestingly, include breathing, which is an activity which can be problematic for those with respiratory disorders such as asthma. This exhaustive list can be extended or restricted through regulation.

47 Code of Practice, Annex 1, para. 6.

Schedule to the Act defines 'long-term' as an impairment which has lasted, or is expected to last, 12 months, or which is likely to last for the rest of the life of the affected person.

An additional concept which required further elaboration, is the notion of (employment) discrimination. The Act states that an employer discriminates against a covered person if: 'for a reason which relates to the disabled person's disability, he treats him less favourably than he treats others to whom that reason does not or would not apply',[48] and this treatment cannot be justified. A failure to comply with the duty to make 'reasonable adjustments' also amounts to discrimination under the Act, where this failure cannot be justified.

The duty to make 'adjustments' applies where arrangements made by or on behalf of an employer, or where any physical feature of the premises occupied by the employer, places the disabled person concerned at a 'substantial disadvantage' in comparison with persons who are not disabled.[49] In such a situation, an employer is under an obligation to take reasonable steps to prevent the disadvantage from occurring.

As noted, employers are not under an absolute duty to make such adjustments, but must only do so where such action is 'reasonable'. Certain factors may be considered in determining whether it is 'reasonable' to require an employer to make an 'adjustment': the extent to which the adjustment would prevent the effect in question; the extent to which it is practicable for the employer to take the step; the costs of the adjustment; the resources of the employer; and the availability of financial assistance.[50]

An employer is entitled to 'discriminate' against a person with a disability, either by treating him or her less favourably, or by refusing to make a 'reasonable adjustment', where the discriminatory behaviour in question is 'justified'. The Act itself states that discriminatory behaviour is 'justified' 'if the reason for the failure [to behave in a non-discriminatory way] is both material to the circumstances of the particular case and substantial'.[51] According to the Code of Practice, '[t]his means that the reason has to relate to the individual circumstances in question and not just be trivial or minor'.[52]

The enforcement mechanism established under the Disability Discrimination Act is closely modelled on that applying to the two other British anti-discrimination acts dealing with sex and race.[53] However, unlike the earlier statutes, the Disability Discrimination Act initially failed to provide for a central monitoring and enforcement body.[54] The Labour government which came to office in 1997 did however appoint a Disability Rights Commission[55] which now fulfils this role.

The Disability Discrimination Act 1995 is more thorough than its German and French counterparts.[56] It attempts to address the problem of defining disability and discrimination, and recognises that some balance must be sought between the interests of employers and the interests of disabled people. However, given the lack of clarity of so many of the Act's key terms, ranging from 'impairment' to 'justified' unfavourable treatment, it is questionable whether the Act can achieve that balance.

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48 Art. 5(1)(a).

49 Art. 6(1). This is somewhat similar to the obligation to make an accommodation under the Americans with Disabilities Act.

50 Art. 6(4).

51 Art. 6(4) and 6(5).

52 Code of Practice, 4.6.

53 Sex Discrimination Act 1975 and Race Relations Act 1976.

54 The two other acts are monitored and partly enforced by the Equal Opportunities Commission and the Commission for Racial Equality respectively.

55 The Disability Discrimination Act was adopted under a Conservative government.

56 Described in section 4A and 4C of the article respectively.

C. Criminal Law: France

In July 1990, the French Parliament adopted Law No. 90-602 concerning the protection of persons against discrimination on grounds of their state of health or their handicap.[57] This law amended the Penal Code, and made it a criminal offence for providers of goods or services to refuse to supply to an individual or association on the grounds of, *inter alia,* state of health or handicap, or for an employer to refuse to hire or to dismiss an individual on these grounds. Unlike the constitutional or civil law approaches examined above, reliance on the criminal law assumes some degree of intent on the part of the discriminator. As a consequence, the notion of discrimination under criminal law differs from that found in the other approaches, particularly with regard to indirect discrimination and reasonable accommodation. Article 225(1) of the New Penal Code defines discrimination as:

> any distinctions between natural persons on grounds of their origin, sex, family situation, state of health, handicap, customs, political opinions, trade union activities, their membership or non-membership, genuine or assumed, of an ethnic group, nation, race or religion. [author's translation][58]

Although the Code contains this very broad definition of discrimination, which also extends protection to legal persons, it makes clear that not all forms of discrimination are punishable under the criminal law. With regard to employment, Article 225(2) specifies that discriminatory behaviour may result in a prison sentence and a fine when it consists of: impeding the normal pursuit of any economic activity; refusing to employ a person, disciplining or dismissing a person; or making the offer of employment conditional upon one of the discriminatory grounds.

The Code clearly aims to cover all economic transactions, including those related to employment, and to exclude personal relationships from its scope. However, the Code goes on to state that discrimination based upon state of health or handicap is permitted where the aim is to prevent or cover the risk of death, injury or invalidity or where the health condition or handicap renders the worker or applicant unsuitable for the position in question. The latter situation only justifies dismissal or a decision not to appoint.[59]

One should note that the Code makes no clear provision for determining when discrimination on the grounds of disability has actually occurred. More particularly, the Code fails to specify whether there is any obligation on employers to alter the working environment where this would allow the individual to perform a particular job. In the absence of a clear statement to this effect, it seems unlikely that such a requirement can be read into the law, meaning that it is not a criminal offence to refuse to hire, or to dismiss someone whose disability requires even a minor adjustment or accommodation, even when such accommodations are intentionally refused.

Commentators have criticised the French approach to employment discrimination, and have argued that it fails to protect minorities adequately.[60] The French law fails to define the

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57 Loi 90-602 du 12 juillet 1990 relative à la protection des personnes contre les discriminations en raison de leur état de santé ou de leur handicap, *Journal Officiel de la République Française*, 13 July 1990, 8272.

58 The original version can be found in the most recent edition of the Code Pénal, Codes Dalloz.

59 Article 225(3).

60 See, *e.g.*, Gitter, D.M., 'French Criminalization of Racial Employment Discrimination compared to the Imposition of Civil Penalties in the United States', in: *Comparative Labor Law Journal*, Vol. 15, 1994, pp. 485-526. Forbes, I. and Mead, G., *Measure for Measure, A Comparative Analysis of Measures to Combat Racial Discrimination in the Member States of the European Community*, Equal Opportunities Studies Group, University of Southampton, 1992, Research Series No.1, Employment Department.

concept of 'handicap' and the precise scope of the protected group. Furthermore, the French Penal Code does not deal adequately with the intricacies of disability discrimination, generally treating it in the same way as all other sorts of discrimination, and neglects the important issue of reasonable adjustment or accommodation. This fact, and the legislative neglect of indirect discrimination,[61] means that employers have a great deal of freedom when it comes to making unfavourable employment decisions concerning disabled people under the Penal Code. The balance between the interests of disabled people and the interests of employers, which other jurisdictions have sought to establish, does not seem to have greatly concerned French legislators in this case. Therefore, of all the disability anti-discrimination laws, in Europe or elsewhere, French law[62] seems to provide the least protection to disabled people and the least effective remedies where discrimination is established. However, as noted above, these limitations are, at least in part, an inevitable consequence of choosing to criminalise discrimination.

D. A European Community Response

At the 1996 inter-governmental conference[63] held to revise the European Treaties a new article was included in Treaty on the European Community giving the Community the competence to take action to combat discrimination on a number of grounds, including disability. The new provision is found in Article 13 of the revised Treaty and reads:

> Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

This article has provided the legal basis for a Framework Employment Directive which addresses discrimination on the grounds of religion, age, sexual orientation and disability.[64] As a result of the Directive, which was adopted in November 2000, all European Union Member States are obliged to adopt employment anti-discrimination legislation specifically addressing disability by the end of 2006 at the latest. This legislation must cover direct and indirect discrimination, as well as discrimination in the form of harassment. In addition, the legislation must impose an obligation to make reasonable accommodations for people with disabilities unless the making of such an accommodation would impose a 'disproportionate burden' on the employer. Given the extent of the present and indeed expected membership

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61 French law fails to proscribe indirect discrimination, because the legislature did not wish to criminalise what is generally considered to be an unintentional wrong.

62 However, it should also be noted that disabled individuals can also rely, in certain cases, on provisions of the civil law contained in the Labour Code. In cases of wrongful dismissal motivated by discrimination, plaintiffs can rely on the wrongful discharge statute. Although this does not specifically cover discriminatory dismissals on the basis of disability, it does provide for remedies, including damages and/or re-instatement, where the dismissal is not made for a 'cause réelle et sérieuse' ('a genuine and serious cause'). The Labour Code also places an obligation on employers to reassign workers who have been disabled as a result of a work related accident or illness to another job within the enterprise where, as a result of the injury, the original position can no longer be maintained. There is no such statutory obligation with regard to other workers who become disabled. However, French courts have increasingly been willing to find that employers are obliged to offer such workers alternative employment, or to make other accommodations to meet the needs of disabled employees. For further information see generally Labour Code Article L 122-45.

63 In fact this involved a drawn out round of negotiations lasting two years.

64 Council Directive 2000/78/EC, O.J. L303/16 of 2 December 2000.

of the European Union, this Directive will clearly result in a significant expansion in the number of countries adopting anti-discrimination, human-rights inspired, laws.

In addition to providing the legal basis for such directives, including possibly a broader disability specific directive, Article 13 may well influence the action of the Community institutions when adopting policy and legislative action based on other Treaty articles, *i.e.* the influence of the article also depends on the extent to which non-discrimination and equal opportunity become tools used when drafting and interpreting Community legislation and policy.[65]

Most recently, at the Nice summit, the European Council adopted the European Union Charter of Fundamental Rights. The Charter provides for a right to be free from discrimination which is partly inspired by Article 13 EC. People with disabilities are also specifically mentioned in Article 26, which provides for a right to integration and participation in community life. However, the Charter does not amount to a Treaty amendment or has the legally binding status of a directive, so its practical effect may be limited.

Beliefs Underlying Anti-Discrimination Laws

It has already been noted that the development of anti-discrimination laws in Europe was prompted by a reconceptualisation of disability by policy makers, and specifically by a move away from the medical concept of disability towards the human rights model. However, the tools which European policy makers have chosen to use to combat disability discrimination, vary in their legislative effect, degree of detail, and, to a certain degree, in the extent to which they embrace the human rights model of disability.

The approach adopted by the United Kingdom, Sweden and Ireland, involving the adoption of fairly detailed civil law which is designed to combat disability discrimination, perhaps involves the greatest recognition of the complexities of disability discrimination. Most significantly, these statutes, unlike the constitutional provisions and the French Penal Code, provide a definition of disability, and a definition of disability discrimination which embraces not only direct and indirect discrimination,[66] but also discrimination in the form of failing to make an accommodation or adjustment to allow the participation of a person with a disability. In addition, these laws impose significant obligations on employers and service providers and are not designed to only impact on the State (as in the case of the German constitutional provision) or only apply in the case of intentional discrimination (as in the case of the French Penal Code). In that sense, one can regard such laws as the most detailed elaboration of the human rights model of disability.

Constitutional provisions, whilst achieving a far lesser degree of detail and specification, and having a lesser impact on relations between private parties, are nevertheless important in that they recognise the right to equality, and freedom from discrimination, as being a fundamental right and worthy of a high degree of protection.

In contrast, the French criminal law is probably the most confused translation of the human rights model of disability into legislation. It does impose obligations on private parties, but only covers cases in which the employer or service provider intended to discriminate. However, the human rights model recognises that most forms of discrimination

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65 For a detailed examination of the significance and likely impact of Article 13 EC see Waddington, L., 'Testing the Limits of the EC Treaty Article on Discrimination', in: *Industrial Law Journal*, Vol. 28, No. 2, 1999, pp. 133-151.

66 Although note that the British Disability Discrimination Act 1995 does not presently cover indirect discrimination.

and disadvantage are not the result of intentional exclusion, but result from attitudes and an infrastructure which simply take little account of the needs of people with disabilities. The human rights model therefore requires not only action to combat intentional discrimination, but also, and perhaps even more, action to combat unintentional indirect discrimination and discrimination in the form of failure to make an accommodation or adjustment to meet the needs of people with disabilities, neither of which is covered by the French Penal Code.

Nevertheless, one can identify some general beliefs behind the adoption of anti-discrimination provisions in Europe. Such legislation is based on the belief that workers with a disability are as good as their non-disabled counterparts, and, given the appropriate non-discriminatory environment, are able to successfully compete for jobs on their merits. Anti-discrimination legislation is also based on the belief that children with a disability are entitled and able to receive education at a conventional school, and that people with disabilities are entitled and able to live amongst the rest of society and account should be taken of their needs. The starting points for the adoption of the 'old' and 'new' legislation and policy are therefore very much opposed.

V Reasons Behind the Change in Approach

As already noted, the revision of the approach to disability and the adoption of anti-discrimination laws and provisions, has occurred over a relatively short period in Europe. There are a number of reasons for this rapid change.

A. An Idea Whose Time Had Come

The acceptance of the human rights model of disability and the adoption of disability anti-discrimination legislation is by no means a recent phenomenon confined to Europe – indeed, in some respects Europe is lagging behind other parts of the world. The European developments noted in this paper have been preceded by a revision of the concept of disability and, consequently policy, in North America[67] and Australia[68] and the United Nations. Furthermore, changes in Europe have been mirrored, more or less simultaneously by changes in countries in Africa,[69] Asia[70] and Latin America.[71] It seems that a revision in the approach to disability was long overdue, and is occurring with surprising speed across the globe.

B. Influence of the Americans with Disabilities Act, United Nations Standard Rules and other non-European Initiatives

Early non-European anti-discrimination initiatives, and particularly the Americans with Disabilities Act of 1990 (ADA), also proved influential in at least two ways. Firstly, the ADA

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67 See in particular the Americans with Disabilities Act of 1990 (USA) and the 1982 Charter of Rights of Freedoms, the Canadian Human Rights Act 1985 and the Employment Equity Act 1995 (Canada).

68 Disability Discrimination Act 1992.

69 See the Bill of Rights in the 1996 South African constitution, and particularly Section 9 on Equality and South Africa's Employment Equity Bill 1998.

70 See India's Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995.

71 See the Draft Resolution on the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities approved by the Permanent Council of the Organization of American States on 26 May 1999, AG/doc.3826/99.

was seen as an example of what could be achieved and of what was needed by European disability campaigners. This was especially true in the English speaking common law countries (the United Kingdom and Ireland), but increasingly, campaigners in non-English speaking countries have been inspired by the ADA. Secondly, the existence of the ADA brought the issue of disability discrimination and legislation designed to combat the discrimination, to the attention of European policy-makers. Again, this was particularly true in the United Kingdom, but continental policy-makers are now also widely aware of the American legislation. The ADA therefore provided a model for both campaigners and policy-makers in Europe.

Even though Europe has a long history of anti-discrimination legislation, new challenges were presented by disability anti-discrimination legislation. These involved defining the protected group and the nature of disability discrimination – and especially the need to make adjustments or accommodations to meet the needs of an individual with a disability. The ADA provided at least examples of how to address these challenges.

At the same time the United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities also sent out a strong political message. The Rules clearly embrace the human rights model of disability, and recognise the role which discrimination, in all its many forms, plays in excluding people with disabilities. Whilst not providing a legislative model in the sense of the ADA, the Standard Rules did serve to bring attention to the need for a new approach to disability policy in Europe.

C. Role of Disability Non-Governmental Organisations

The last few years have seen the development of a politically active disability movement in many parts of Europe. Whilst in some countries, such as the United Kingdom, politically sophisticated organisations representing the interests of people with disabilities have been active for some time, in others the development of such a movement is a relatively recent phenomenon. The growth of the disability movement has been prompted, to a significant degree, by developments at the European Community level. The Community has provided funding for activities organised by non-governmental organisations which focus on disability and for the establishment of what has become an independent European Disability Forum made up of numerous national and pan-European Community disability non-governmental organisations. A key part of the work of the European disability movement has been the campaign for the inclusion of an anti-discrimination article which specifically mentioned disability at the previous revision of the Treaty on the European Community.[72] This initiative brought together many national disability organisations which campaigned at both the European and national level, and served to heighten awareness and indeed educate disability organisations in Europe about anti-discrimination legislation. Lessons learnt in the European context have been and are, in some cases at least, also proving to be of use in similar national campaigns which are slowly reaping rewards.

Conclusion

a) Recent years have seen important and noticeable changes in the approach to disability policy in many European countries. Underlying this change is a view of disability based on a human rights model, and a key element of the new approach is the adoption of anti-

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72 See section IV above.

discrimination legislation. This change reflects developments at the international level, where newer disability specific instruments, such as the United Nations Standard Rules, are now based on the human rights model of disability and older universal instruments which make no specific mention of disability, such as the ICESCR, are being reinterpreted with emphasis being placed on the fact that people with disabilities must benefit equally from the relevant rights.

b) European countries, with their different legal systems and traditions, have chosen to address disability discrimination through a variety of legislative tools, including constitutional provisions, civil law and criminal law. Thus far, the civil law provisions have achieved the greatest detail and dealt in the most sophisticated manner with the problem of disability discrimination. Such statutes generally cover not only direct and indirect discrimination, but also discrimination in the form of failure to make an adjustment or accommodation to meet the needs of an individual with a disability. The adoption of such a law in Sweden is important in that it demonstrates that such an approach is not only of relevance to common law countries in Europe (*e.g.* the United Kingdom and Ireland).

c) Anti-discrimination legislation can, and usually does, apply across many areas, including employment, access to goods and service and transport. The legislation is based on a principle which is of universal relevance and applicability. Earlier legislation, which provided for either only limited support to allow participation in mainstream society or, frequently, segregation or separation of people with disabilities, applied to specific areas such as employment or education. The non-discrimination principle may, because it is of general relevance, bring more cohesiveness to disability policy.

d) One can question whether legislation and policy adopted in an earlier period, and based on the medical model of disability, can or should co-exist with the new approach – from either a philosophical or practical point of view.[73] The question has been raised, for instance, with regard to employment quotas. The answer depends, to a large extent, on the legislation or policy at issue. For example, intervention designed to facilitate the employment of people with disabilities in the open labour market through the provision of financial or technical support for employers seems compatible with the new approach. Such support will assist the employer to make adjustments or accommodation to meet the needs of workers with a disability, and in fact is a good complement to the non-discriminatory approach.

Quota systems would seem to be less compatible with the non-discriminatory approach. However, the real test should be whether quotas, or any other legislation / policy, actually works, or could be made to work, in the sense that the legislation or policy contributes to the well being of people with a disability. The analysis in this article suggests that quota systems which are based on a recommendation or which are not enforced, serve little useful purpose. Quota systems which are enforced through a fine or a levy, may perhaps be more effective in securing employment for people with a disability; in any case they are undoubtedly effective in securing substantial funds to promote the employment of people with a disability. No doubt, for many policy-makers, this reason alone will be sufficient justification for the retention of such quotas.

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73 For a more detailed discussion of this issue see Waddington, L. and Diller, M., 'Tensions and Coherence in Disability Policy: The Uneasy Relationship between Social Welfare and Civil Rights Models of Disability in American, European and International Employment Law', paper presented to the DREDF conference 'Principles to Practice', 22-26 October 2000, Washington D.C.

e) The influence of the human rights model of disability and the adoption of disability anti-discrimination legislation is likely to continue in Europe. The role of the European Community, which has adopted the said approach and which has now adopted a non-discrimination employment directive, will be vital in this respect. In this respect, it should be recalled that the European Community and Union are expected to expand in the coming years with the accession of a number of countries in Eastern Europe. A European Union of 30 or more countries in the next decade is not an unlikely prospect. In addition, the experience of those European countries which have already adopted national anti-discrimination provisions, is likely to influence those countries which have yet to do so.